

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: August 30, 2004

TO : Gary W. Muffley, Regional Director
Region 9

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: I.B.E.W. Local 369
(Graycor Construction Co.)
Case 9-CC-1664

560-7540
560-7540-2070
560-7540-2080-2500
560-7540-2080-6200
560-7540-4000
560-7540-8060-0120
560-7540-8060-0130
560-7540-8060-5000
560-7540-8070-1700

This case was submitted for advice as to whether the Union's walking with placards at neutral gates constituted unlawful common situs picketing, and whether the Union's brief posting of a single, stationary "observer" at a neutral gate constituted signal picketing.

We conclude that walking while wearing placards constitutes patrolling of the neutral gate and thus picketing, and that this picketing was secondary in violation of Section 8(b)(4)(i)(ii)(B). We conclude that there is insufficient evidence to establish that the Union's single, stationary "observer" functioned as a signal picket.

FACTS

General Growth Properties contracted with Graycor Construction to demolish stores in the northwest section of the River Falls Mall (the mall). Graycor subcontracted the electrical work to Payne Electric, a non-union contractor.

Demolition work began on June 1, 2004.¹ On the morning of June 17, a group of about a dozen agents of IBEW Local 369 (the Union) assembled in interior mall space at the north and east customer entrances to the mall building.

¹ All dates are in 2004 unless noted otherwise.

The Union agents wore large sandwich board style placards around their necks.² The placards read:

THE ELECTRICIANS ON THIS JOB ARE NOT RECEIVING WAGES
AND BENEFITS EQUAL TO THOSE CONTAINED IN THE INSIDE
AGREEMENT OF IBEW LOCAL 369. WE ARE PICKETING PAYNE
ELECTRIC.

After approximately ten minutes, mall security guards and General Growth employees arrived and confronted the Union agents. The Union agents refused to leave; General Growth called the police. General Growth's project manager Hellbush then arrived and spoke with Union President Pulliam about the Union's activities.

Hellbush told Pulliam that General Growth did not want the Union to conduct its campaign on mall property. Hellbush offered to drive Pulliam around the mall property and to identify public property where Union agents could picket and handbill. Pulliam agreed; Hellbush and another General Growth employee then drove Pulliam around the perimeter of the mall property. As they drove, Hellbush identified six public property locations where the Union agents could safely station themselves to disseminate their message. Hellbush also stated that separate gates for union and non-union contractors would be established.

Upon returning, Pulliam directed the Union agents to take positions at each of the public entrances to the mall property. At each entrance, Pulliam stationed two to four placard-wearing Union agents, whom he referred to as "walkers". The Union "walkers" remained until 2:00 p.m. and then returned to the mall entrances the following day, June 18. Beginning on that day, the "walkers" began distributing handbills that described the Union's dispute with Payne for failing to pay Union scale wages and benefits. The handbills urged recipients to contact General Growth and voice their support for the Union. During the entire time the Union "walkers" were stationed at the public mall entrances, they walked on the public sidewalk in no particular pattern, and also occasionally entered mall driveways to distribute the handbills.³

² The placards were approximately three and one half feet tall and two feet wide, covering the Union agents from their shoulders to their knees.

³ There is no evidence that the Union "walkers" patrolled directly in front of mall entrances or otherwise blocked ingress to or egress from the mall.

Some time on June 18, Graycor established a reserve gate system by posting signs at each of three construction site entrances to the job site.⁴ Graycor required Payne employees, visitors, and suppliers to enter and leave the job site through the two construction site gates on the west side of the construction staging area. Graycor established the third, separate construction site gate for the remaining contractors. However, Graycor allowed neutral contractors and their employees, visitors, and suppliers to also use any of the public mall entrances. Graycor advised the Union of these reserved gates by faxing a letter to the Union's offices.⁵

The Union ignored Graycor's reserved gate system. Accordingly, when Union "walkers" resumed their activities on Monday, June 21, they returned to all the public entrances to the mall property. The Union continued this activity until June 30.

On June 24, a Graycor employee asked a Union agent what it would take to get the Union to take the pickets down. The Union agent told the Graycor employee, "Get Payne to sign a contract or get Payne off the job."⁶ Graycor filed the instant charge on that day. After reviewing his copy of the charge, Pulliam directed some of the Union "walkers" to also patrol the construction site gates reserved for Payne.

On June 30, the Union advised Graycor and the Region that the Union would cease these activities at the mall. Also on June 30, the Union attempted to locate an "observer" at the construction site entrance used by union contractors, i.e., at the neutral gate. At the time, this gate was located on interior mall property. When Union agents arrived, police were summoned, the Union was required to leave and no actual observing occurred.

⁴ These construction site entrances were separate and apart from the public mall entrances. The Union does not allege that the gate system or the signage designating union and non-union gates was ambiguous or confusing.

⁵ The Union admits receiving the fax on June 18, but claims that the fax did not actually reach Union President Pulliam for several days.

⁶ Union organizer William J. Weiter later confirmed the agent's comments.

The following day, July 1, this neutral gate was relocated from the interior mall to one of the public mall entrances. Beginning at 10:00 a.m. that day, the Union stationed a single individual at this mall entrance. The individual placed a sign that read "observer" on the ground in front of a chair he sat in while observing the entrance. The "observer" remained from 10 a.m. until 2:30 pm. During that time, he did not walk around, pass out handbills, nor talk to anyone leaving or entering the gate. The "observer" did not return.

ACTION

We conclude that (1) the Union's positioning of placard-wearing agents to patrol public mall entrances from June 17 to June 30, amounted to picketing; (2) the picketing enmeshed neutral employers and thus violated Section 8(b)(4)(i)(ii)(B); and (3) there is insufficient evidence to establish that the Union's brief use of the single, stationary "observer" functioned as an unlawful signal picket.

Union picketing usually involves individuals patrolling while carrying placards; whether the placards are attached to sticks is immaterial.⁷ The Board has long held, as well, that the presence of traditional picket signs and/or patrolling is not a prerequisite for finding that a union's conduct is the equivalent of traditional picketing.⁸ "The important feature of picketing appears to be the posting by a labor organization ... of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business."⁹

⁷ See Painters District Council 9 (We're Associates), 329 NLRB 140, 142 (1999) (individuals carrying picket signs "without sticks" was picketing); Brewery Workers Local 366 (Adolph Coors Co.), 121 NLRB 271, 282 (1958) (picketing consisted not of signs with sticks, but placards fashioned into sandwich boards). See also Service Employees Local 87 (Trinity Maintenance), 312 NLRB 715, 750 (1993), enfd. mem. 103 F.3d 139 (9th Cir. 1996) (demonstrators never carried conventional placards, but carrying message bearing flags at the entrances to two buildings "clearly constituted picketing").

⁸ See, e.g., Lawrence Typographical Union No. 570 (Kansas Color Press), 169 NLRB 279, 283 (1968), enfd. 402 F.2d 452 (10th Cir. 1968), citing Lumber & Sawmill Workers Local No. 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388, 394 (1965).

Picketing involves a "mixture of conduct and communication," and does not solely depend upon the persuasive force of the idea being conveyed, but rather on "the conduct element [which] 'often provides the most persuasive deterrent to third persons about to enter a business establishment.'"¹⁰ The Board has also recognized that the "conduct element" in picketing invokes a response regardless of any message.¹¹ "Section 8(b)(4) proscribes picketing and "all [union] conduct . . . intend[ed] to coerce, threaten, or restrain third parties to cease doing business with a neutral employer, or to induce or encourage its employees to stop working, although this need not be the union's sole objective."¹²

The instant Union conduct occurred at public mall entrances and thus at a common situs. The Board in Moore Dry Dock¹³ delineated four criteria to determine whether an object of a union's common situs picketing is to unlawfully enmesh neutral employers in its dispute with a primary. Common situs picketing generally is lawful if: (1) the picketing is strictly limited to times when the situs of the dispute is located on the neutral employer's premises; (2) at the time of the picketing the primary employer is

⁹ Stoltze Land & Lumber Co., above, 156 NLRB at 394; see also United Mine Workers District 12 (Truax-Traer Coal Co.), 177 NLRB 213, 218 (1969), enfd. 76 LRRM 2828 (7th Cir. 1971).

¹⁰ See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Trades Council, 485 U.S. 568, 580 (1988), quoting NLRB v. Retail Store Employees Union Local 1001 (Safeco), 447 U.S. 607, 619 (1980) (Stevens, J., concurring).

¹¹ See, e.g., Iron Workers Local 386 (Warshawsky & Co.), 325 NLRB 748, 753 (1998) enf. denied sub nom Warshawsky & Co. v. NLRB, 182 F.3d 948 (D.C. Cir. 1999), cert. denied 529 U.S. 1003 (2000), citing Bakery & Pastry Drivers & Helpers, Local 801 v. Wohl, 315 U.S. 769 (1942); Laborers Local 332 (C.D.G., Inc.), 305 NLRB 298, 305 (1991), citing Hughes v. Superior Court of California, 339 U.S. 460 (1950).

¹² Teamsters Local 122 (August A. Busch & Co.), 334 NLRB No. 137, slip op. at 15 (2001) (citations omitted), enfd. 2003 WL 880990 (D.C. Cir. 2003). See also Trinity Maintenance, above, 312 NLRB at 743.

¹³ Sailors' Union of the Pacific (Moore Dry Dock Co.), 92 NLRB 547 (1950).

engaged in its normal business at the site; (3) the picketing is limited to places reasonably close to the location of the situs of the dispute; and (4) the picketing discloses clearly that the dispute is with the primary employer.¹⁴

A union's common situs picketing is presumptively unlawful if it fails to comport with any of the requirements of Moore Dry Dock.¹⁵ The Board has also held that picketing of clearly established and properly maintained neutral gates constitutes noncompliance with the third Moore Dry Dock requirement that picketing be limited to places reasonably close to the situs of the dispute.¹⁶ Such conduct violates Section 8(b)(4)(i)(ii)(B) because it is "plainly aimed at inducing strike action by employees of [neutral employers] with whom [the union] has no dispute[.]"¹⁷

Extrinsic evidence, such as a picketer's explanation for the picketing, may also establish that the union intended to enmesh neutrals in the dispute.¹⁸ In Rollins Communications, the union told a neutral contractor that it would remove its pickets only after the neutral provided written assurances that the primary subcontractor would not work on the job until the primary's employees were paid prevailing wages and benefits.¹⁹ Since this statement indicated that the union was deliberately entangling the neutral employer by telling the neutral employer that he, alone, had the power to resolve the underlying dispute, the

¹⁴ Id. at 549.

¹⁵ See, e.g., Iron Workers Local 433 (United Steel), 293 NLRB 621, 622 (1989), *enfd. mem.* 930 F.2d 28 (9th Cir. 1991).

¹⁶ Operating Engineers Local 150 (Harsco Corp.), 313 NLRB 659, 668 (1994) citing Nashville Building Trades Council (Markwell & Hartz), 164 NLRB 280 (1967). See also Iron Workers Local No. 378, 302 NLRB 200, 208 (1991).

¹⁷ Harsco, above, 313 NLRB at 668.

¹⁸ See Electrical Workers IBEW Local 441 (Rollins Communications), 222 NLRB 99, 99-100 (1976), *enfd. mem.* 569 F.2d 160 (D.C. Cir. 1977), on remand from 510 F.2d 1274 (1975), denying enforcement to 208 NLRB 943 (1974).

¹⁹ Rollins Communications, 222 NLRB at 101.

union's picketing was found to be secondary in violation of 8(b)(4)(B).²⁰

In the instant case, we first conclude that the Union's wearing of signs and patrolling clearly amounted to picketing.²¹ Rather than using pure speech, the Union used conduct, i.e., wearing signs, taking positions at pedestrian entrances and public vehicle entrances to the mall, and walking around those entrances, to evoke a sympathetic response from employees and the general public. We next conclude that this "picketing" was secondary for several reasons.

First, the Union failed to comply with the third Moore Dry Dock criterion, never restricting its picketing to locations reasonably close to the site of the primary dispute. The Union's initial picketing on interior mall property on June 17 took place at the north and east pedestrian entrances to the mall, despite the fact that Payne was working in the northwest portion of the mall. On June 18, the Union picketed at all public entrances to the mall rather than those closest to the job site. Also, the Union subsequently intentionally ignored Graycor's establishment of a reserved gate system and picketed at neutral gates and unrestricted public entrances to the mall property.²² Such picketing is clearly within the broad

²⁰ Id. at 100-101. Cf. Electrical Workers IBEW Local 453 (Southern Sun Electric Corp.), 237 NLRB 829, 830 (1978), enfd. 620 F.2d 170 (8th Cir. 1980) (no violation for union representative to reply to neutral that its picketing would end if the primary was off the job, where remark was informational and was neither intended nor understood as a request for assistance); see also, Carpenters District Council of Detroit (Douglas Co.), 322 NLRB 612, 612 (1996) (no violation where union told neutral that "hav[ing] a prevailing wage contractor do the work" would resolve the picketing).

²¹ Food and Commercial Workers Local 1776 (Carpenters Health) Fund, 334 NLRB at 507, (2001): "Wearing signs and patrolling is universally accepted as 'picketing.'" United Mine workers (Jeddo Coal), 334 NLRB 677, 686 (2001) (individuals patrolling and carrying placards was "classic form of picketing").

²² We are unaware of any case support for the Union's contention that it was privileged to disregard Moore Dry Dock generally, and Graycor's clearly and properly established gate system specifically, merely because a General Growth representative advised the Union that it

definition accorded the Section 8(b)(4)(i) language "induce or encourage,"²³ and would reasonably tend to coerce neutral employers to cease doing business with Payne.²⁴

In addition to its disregard for Moore Dry Dock and the reserve gate system, the Union agent's picket line statement to a Graycor employee further evinced the Union's secondary object of enmeshing neutral employers in its dispute.²⁵ The Union agent indicated that an end to the Union's picketing was contingent upon Graycor "get[ting] Payne to sign a [Union] contract get[ting] Payne off the job."²⁶

In sum, the Union's patrolling with placards constituted picketing. The Union's picketing violated Section 8(b)(4)(i)(ii)(B) because it did not comply with Moore Dry Dock, or with Graycor's reserved gate system, and extrinsic evidence also indicates that the picketing was intended to enmesh neutral Graycor.

We conclude that there is insufficient evidence to establish that the Union's brief use of a single "observer" functioned as unlawful signal picketing.²⁷ The Board has

would tolerate picketing and/or handbilling on public property.

²³ Electrical Workers IBEW Local 501 v. NLRB, 341 U.S. 694, 700-702 (1951). "The words 'induce or encourage' [in Sec. 8(b)(4)(B) of the Act] are broad enough to include in them every form of influence and persuasion." See, e.g., Sheet Metal Workers Local 19 (Delcard Associates), 316 NLRB 426, 437 (1995) (common situs picketing at a neutral gate violated Section 8(b)(4)(i)(B), regardless of whether the picketing caused any work stoppage).

²⁴ See e.g., General Service Union Local No. 73 (Andy Frain), 239 NLRB 295, 306 (1978) (picketing was designed to inflict injury on the secondary employer's business generally, for an object of forcing or requiring the secondary employer to cease doing business with the primary employer).

²⁵ We note that Union organizer William J. Weiter ratified the agent's comments.

²⁶ See Rollins Communications, above, 222 NLRB at 101.

²⁷ Carpenters Local 1245 (New Mexico Properties), 229 NLRB 236, 242 (1977) (picketer at primary gate lawfully walked to corner to observe neutral gate).

found a union observer to have constituted unlawful signal picketing where the alleged "benign observer" engaged in signaling conduct.²⁸ Here, however, the observer remained stationary and silent, engaging in no conduct other than passive observation.²⁹ In addition, the Union stationed the observer at the neutral gate recently relocated from the construction site. The Union arguably had good reason to monitor this gate because it was newly established and thus subject to misuse.

We recognize that the Union located its observer where the Union earlier had engaged in actual picketing. The Board has found that nonpicketing activity at former picketing locations may constitute a continuation of the prior picketing.³⁰ In such cases, however, the Union did not engage solely in observer conduct. Rather, it engaged in other conduct including the same conduct that the actual pickets had engaged in earlier, e.g., license plate

²⁸ See Electrical Workers Local 98 (Telephone Man), 327 NLRB 593, 593 (1999) (individual wearing "observer" sign at times flipped sign over to reveal same language used by actual pickets at primary gate and thus "was not merely a benign observer but rather was engaged in impermissible signal picketing at the neutral gate."); Sheet Metal Workers Local 19 (Delcard Associates), 316 NLRB 426, 437-438 (1995) (sign-wearing observers held to be picketers where they patrolled neutral gates); Plumbers Local 274, 267 NLRB 1111, 1114 (1983) (observers were pickets where they patrolled in front of neutral gate with placards; men were assigned to the gate from the inception of the picketing before any alleged breaches of the neutral gate could have occurred).

²⁹ There also apparently is no evidence that the "observer" was identified as a Union agent and thus linked with the Union's prior picketing.

³⁰ "Following in the footsteps of the conventional picketing which had preceded it, this conduct [handbilling, license plate recording] was intended to have, and could reasonably be regarded as having had, substantially the same significance for persons entering the Company's premises as Respondent's preceding picketing . . ." Kansas Color Press, supra, 169 NLRB at 284. See also Stoltze Land & Lumber, supra, 156 NLRB at 394 (handbilling and continuing to record license plates at same location as prior picketing constituted "picketing"); Andy Frain, supra, 239 NLRB at 306 (walking about distributing leaflets, posting leaflets on car windows, and acting as is photographing neutrals constituted picketing "in context of earlier incidents . . . of actual picketing" at same location.).

recording. In contrast, the Union's single, seated observer here did not engage in any other conduct, and thus would not reasonably be linked to the Union's prior picketing by several individuals at that location. In all these circumstances, the Region should not allege that the Union's observer was a signal picket in violation of Section 8(b)(4)(i)(ii)(B).

In sum, the Union's placard wearing "walkers" at the public entrances to the mall property, and also at neutral gates, constituted picketing. The Union's failure to conform its picketing to Moore Dry Dock standards, and its statement linking an end to the picketing with direct action by a neutral employer, establish that the Union was engaged in unlawful, secondary picketing. Finally, there is insufficient evidence to establish that the Union's brief use of a single, stationary observer was unlawful signal picketing.

B.J.K.